Supreme Court, U.S.
FILED
APR 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1288

In the Supreme Court of the United States

October Term, 1986

ROBERT C. KRUTZ,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May Petitioner request this Court to issue a Writ of Certiorari to a state supreme court when that court's decision was based solely on statutory construction of Ohio law and Petitioner never raised a federal question in any of the state court proceedings, and further where the decision of that court clearly does not infringe upon the Petitioner's due process rights to a fair trial.

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To the Honorable Chief Justice and Honorable Associate Justices of the Supreme Court of the United States.

The Respondent, State of Ohio, respectfully requests that this Court deny Petitioner's prayer that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Ohio entered on December 19, 1986.

OPINIONS BELOW

Petitioner was indicted on 49 counts of Theft in Office. Before trial, Petitioner filed a motion to dismiss 48 of the counts. The trial Court granted the motion and consolidated all 49 counts into one. This ruling appears in the Petitioner's Appendix at p. A14.

On appeal by the State, the decision was affirmed by a vote of 2-1 by the Appellate Court. This decision, along with the dissenting opinion of Judge Cook, is unreported and appears in the Petitioner's Appendix at p. A7.

The Supreme Court of Ohio, on December 19, 1986, in *State v. Krutz,* 28 Ohio St. 3d 36 (1986), unanimously reversed, reinstating all 49 counts. No petition for rehearing was filed. A copy of this decision appears in the Petitioner's Appendix at p. A1.

On February 24, 1987, Respondent requested and was granted an extension allowing the State to file its Brief in Opposition to Petition for Writ of Certiorari by April 3, 1987.

JURISDICTION

This Court does not have jurisdiction to review Petitioner's request since the Ohio Supreme Court ruling was not based on a federal question as required by 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISION INVOLVED

Although Petitioner claims that his rights under the Fourteenth Amendment to the U.S. Constitution were violated, he never raised this issue in the State courts and he has wholly failed to demonstrate such abridgement in his Petition.

STATEMENT OF THE CASE

Robinson Memorial Hospital is a County hospital located in Ravenna, Ohio. Defendant, Robert Krutz, hereinafter referred to as Petitioner, was the appointed administrator of this hospital, and as such a public official.

In connection with his duties as administrator, the Hospital Board of Trustees had given Petitioner permission to obtain and use a VISA card for his expenses incurred in connection with hospital business only. Although Petitioner was supposed to obtain approval of his expenses each month from the Board, he did not do so. Instead, he used a hospital checking account, over which he had exclusive control, to pay the monthly VISA bills.

Over a period of a few years, Petitioner used his VISA card for many personal items not connected with hospital business. He took vacations with his girl friend to Hilton Head, North Carolina; purchased a watch for himself and a ticket to a political fundraiser which he attended; sent flowers to his wife and daughter on their birthdays; bought dinner for himself and his girl friend at numerous restaurants in Northeast Ohio; and even used it to pay a hotel bill at the Aurora Sheraton for his stay there while he was separated from his wife. He would also send his assistant to a nearby store to purchase beer and cigarettes

for his own consumption. The assistant used cash to purchase the items from the store and Petitioner reimbursed him with checks from the same hospital checking account that he used to pay the VISA card bills.

On April 17, 1984, the Portage County Grand Jury indicted Petitioner on 49 separate counts of Theft in Office under Ohio Revised Code Section 2921.41 (A)(1). Petitioner entered a plea of not guilty. The Court of Common Pleas of Portage County set the case for a jury trial in July of 1984, which was later continued until September 11, 1984.

On July 12, 1984, Petitioner filed a Motion to Dismiss 48 counts and also requested the prosecution to elect which of the 49 counts it was going to proceed upon. Respondent, the State of Ohio, hereinafter referred to as the State, filed a Motion in Opposition to Defendant's Motion to Dismiss on August 3, 1984. The motions were entertained and the judgment entry, which was adverse to the State, was journalized on August 29, 1984. Citing Ohio Revised Code Section 2913.61, *Value of Property,* Subsection (C), as authority, the Trial Court merged all 49 counts into one count, thereby dismissing 48 counts. Thereafter, before the start of the trial, the State filed a timely Notice of Appeal to the Court of Appeals, Eleventh Appellate District. On November 25, 1985, the Court of Appeals, in a 2-1 decision, with Judge Robert Cook writing a dissenting opinion, affirmed the Trial Court's decision.

The State filed a timely Notice of Appeal with the Supreme Court of Ohio on December 23, 1985. Leave to Appeal was thereafter granted by the Ohio Supreme Court on March 12, 1986. On December 19, 1986, the Ohio Supreme Court unanimously reversed both the Trial Court and Appellate Court decisions, holding that Ohio

Revised Code Section 2913.61 only required merger of theft offenses committed in violation of Ohio Revised Code Section 2913.02.

At no time in any of the State Court proceedings did Petitioner ever raise a federal question. His first reference to the U.S. Constitution appears in this Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

Where a state court combines its principles of statutory construction with the expressed intent of the state legislature to determine the applicability of a state statute, and neither the constitutional validity nor application of that statute is raised in the state court, no federal question for which the United States Supreme Court will exercise jurisdiction exists.

ARGUMENT

This case does not raise any questions reviewable by this Court. The only issue presented to the State Trial Court, Appellate Court and Supreme Court was the proper construction of a state statute, Ohio Revised Code Section 2913.61 (C), *Value of Stolen Property*. That section states in relevant part:

> When a series of offenses *under Section 2913.02* of the Revised Code is committed by the offender in his same employment, capacity, or relationship to another, all such offenses shall be tried as a single offense, and the value of the property or services involved *for the purpose of determining the value* as required by division (A) of this section, is the aggregate value of

> all property and services involved in all offenses in the series. (Emphasis added).

It is clear that this section only requires consolidation into one charge of theft offenses committed in violation of Ohio Revised Code Section 2913.02, *Theft,* the general theft offense section. *State v. Krutz,* 28 Ohio St. 3d 36 (1986). Petitioner claimed that the 49 counts of Theft in Office, in violation of a different chapter and section of the Ohio Revised Code, namely Section 2921.41 (A)(1), must be tried as one offense pursuant to Section 2913.61 (C). Ohio Revised Code Section 2921.41 (A)(1) reads as follows:

> § 2921.41 Theft in office.
>
> (A) No public official or party official shall commit any theft offense, when either of the following applies:
>
> (1) The offender uses his office, or permits, or assents to its use, in aid of committing the offense;

The Ohio Supreme Court looked to its well settled state law and applied its rule of statutory construction that the plain and unambiguous language of a statute would not be ignored,

> especially when application of the rule of construction would be contrary to the clearly manifested intent of the legislature. *Krutz, supra* at 38.

The Court went on to say that

> [a] reading of Revised Code Section 2913.61 (C) clearly indicates that only offenses under Revised Code 2913.02 must be tried together when committed in the same employment, capacity, or relationship to another; the statute does not say "all theft offenses," but merely ". . . a series of offenses under Section

> 2913.02." In addition to the plain language of Revised Code 2913.61 (C), it is clear that any interpretation requiring the phrase "offenses under Section 2913.02" to include violations of Revised Code 2921.41, theft in office, would be contrary to the clearly manifested intent of the legislature. . . . *Id.*

The decision of the Ohio Supreme Court also noted that Chapter 2913 proscribes theft and fraud offenses, while Chapter 2921 addresses offenses committed by public officials which tend to subvert the processes of a democratic government. The Committee Comments to Ohio Revised Code Section 2913.61 and Chapter 2913 in general, specify that Chapter 2913 addresses "the basic theft offense" and Section 2913.61 merely contains rules for combining a series of offenses and gives detailed criteria for determining the value of the stolen property *when value is an element. Krutz, supra* at 38.

> Although value is not always an element of violations of Revised Code 2913.02, *i.e.,* when there is a theft and one or more prior theft offenses, *value is never an element of violations of Revised Code 2921.41.* Any theft in office, no matter how small the value of the item stolen, is a third-degree felony. *Id.* (Emphasis added).

The Court continued its analysis of the differences between the two sections by indicating that

> R.C. Chapter 2921 . . . has two additional requirements not found in R.C. Chapter 2913: (1) that the thief be a public official and (2) that he use his office to commit or facilitate commission of that theft or that the property . . . involved be owned by the government. *Id.*

It concluded by saying that

> while thievery is regulated by both chapters, R.C. Chapter 2921 adds these requirements in order to serve a separate purpose—more stringent punishment of, and protection of the public from, those who abuse and corrupt public offices. *Id.* at 38-39.

The Court reasoned that the language of Ohio Revised Code Section 2913.61 (C) was clear and unambiguous. It further found that the legislative intent was to deal with theft in office separately since it is of great public concern and held that theft in office offenses are not "theft offenses" and need *not* be tried as a single offense as claimed by Petitioner. It is obvious from a review of the above that a question of the state law was passed on solely by the application of state law.

Petitioner's argument before this Court is almost a verbatim reproduction of his brief presented to the Ohio Supreme Court, and as such, provides this Court with all that Petitioner presented to the State Courts. The State's position, like the decision of the Ohio Supreme Court, focused solely on the construction of the statute in question. It is not the function of the United States Supreme Court on reviewing a decision of the state's highest court to construe a state statute contrary to the construction given by the highest court of the state. *See Landmark Communications, Inc. v. Virginia,* 435 U.S. 829 (1978).

More importantly, however, the threshold requirement that there be presented a federal question for the Court's review has not been met by Petitioner. The Supreme Court's jurisdiction to review a state court decision under 28 U.S.C. Section 1257 is dependent upon the presence of a federal question in the case. *St. Louis, I.M. FS. Railway Co. v. Taylor,* 210 U.S. 281 (1908); *Palmer*

Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390 (1952). Furthermore, it is a necessary requirement for review on certiorari that the federal question, if there is one, be expressly decided by the state court or that, by implication, the judgment could not have been made without deciding the federal question. *First National Bank v. Estherville*, 215 U.S. 341 (1910); *Webb v. Webb*, 451 U.S. 493 (1981).

A state court's refusal to read more into a statute than is readily apparent from the plain language of that statute, does not implicate federal constitutional rights when neither its federal constitutional validity or application is put in issue. The State Supreme Court correctly held that the clear reference to *only* Ohio Revised Code Section 2913.02 as the applicable theft offenses for which a series of some are to be consolidated under Section 2913.61 (C) meant *only* those theft offenses in Section 2913.02. It held nothing more, as that was the sole question before it.

The record discloses no claim under a federal statute or the United States Constitution presented in the state courts. Additionally, there is nothing clearly shown in the record to indicate that the courts were apprised of the nature or substance of the federal claim at the time and manner required by law. The phrase "Due Process" was never used, no reference was made to federal constitutional rights under the Fourteenth Amendment, no federal supreme court case law was relied on and the State Supreme Court used no language to suggest in any way that it ruled on a federal issue. In fact, the State Court articulated an independent state ground with sufficient clarity. These points are amply demonstrated in the petition before this Court. Under such circumstances, the petition for certiorari should be dismissed as jurisdiction is plainly

lacking. *Webb v. Webb, supra; Oliver v. United States,* 466 U.S. 170 (1984).

Petitioner hints at a federal equal protection claim; however, Respondent advances two arguments which it believes precludes the Court from considering this issue. First, Petitioner's subtle suggestion of an equal protection violation in the body of his petition without more is not sufficient for the Court to invoke its jurisdiction over the matter. Under the provisions of Supreme Court Rule 21.1 (a) and pursuant to its many consistent holdings, this Honorable Court has declared that it will not consider an issue if it is not fairly comprised in the statement of the questions presented by the petition for certiorari. *United States v. Penn Foundry & Mfg. Co.,* 337 U.S. 198 (1949); *Andrew v. Louisville & Nashville Railroad Co.,* 406 U.S. 320 (1972); *United States v. Leon,* 468 U.S. 897 (1984).

Second, if the issue of equal protection can be said to have been before the State Court, however subtly, that question was disposed of by the application of state law and what the State Court decided was the intent of its own legislature. The Ohio Supreme Court's adequate and independent state ground for its decision bars further review in the Supreme Court. *Bell v. Maryland,* 378 U.S. 226 (1964); *Herb v. Pitcairn,* 324 U.S. 117 (1945). Furthermore, this Court has declined to pass on a constitutional challenge where a statute is susceptible of a construction by the state judiciary which might avoid in whole or part the necessity for federal constitutional adjudication. *H.L. v. Matheson,* 450 U.S. 398 (1981).

CONCLUSION

Applying principles of statutory construction with express legislative intent, the Ohio Supreme Court properly found that Ohio Revised Code Section 2913.61 (C) applies only to offenses under Ohio Revised Code Section 2913.02 and not to offenses committed under Ohio Revised Code Section 2921.41. Although Petitioner now alleges a federal question, the only legal issue involved in this case concerns the interpretation of state law. Petitioner has failed to specify in his petition at what stage of the state court proceedings he raised a federal question. The reason for this failure to comply with United States Supreme Court Rule 21.1 (a) is that the alleged federal question was not raised in the state trial court and was only raised, if at all, in a vague and unspecified manner before the state appellate courts. Therefore, the federal question, if any exists, was neither timely nor properly raised, thus, depriving this Court of jurisdiction.

Wherefore, Respondent respectfully requests that certiorari be denied.

Respectfully submitted,

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APPENDIX

OHIO REVISED CODE

THEFT

§ 2913.02 Theft.

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

(1) Without the consent of the owner or person authorized to give consent;

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

(3) By deception;

(4) By threat.

(B) Whoever violates this section is guilty of theft. If the value of the property or services stolen is less than three hundred dollars, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is three hundred dollars or more and is less than five thousand dollars, or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, or if the offender has previously been convicted of a theft offense, a violation of this section is theft, a felony of the fourth degree. If the value of the property or services stolen is five thousand dollars or more, or if the offender has previously been convicted of two or more theft offenses, a violation of this section is grand theft, a felony of the third degree. If the property stolen is a motor vehicle, as defined in section 4501.01 of the

Revised Code, a violation of this section is grand theft of a motor vehicle, a felony of the third degree.

VALUE

§ 2913.61 Value of stolen property.

* * * * *

(C) When a series of offenses under section 2913.02 of the Revised Code is committed by the offender in his same employment, capacity, or relationship to another, all such offenses shall be tried as a single offense, and the value of the property or services involved for the purpose of determining the value as required by division (A) of this section, is the aggregate value of all property and services involved in all offenses in the series. In prosecuting a single offense under this division, it is not necessary to separately allege and prove each offense in the series. It is sufficient to allege and prove that the offender, within a given span of time, committed one or more theft offenses in his same employment, capacity, or relationship to another.

PECULATION AND DERELICTION

§ 2921.41 Theft in office.

(A) No public official or party official shall commit any theft offense, when either of the following applies:

(1) The offender uses his office, or permits, or assents to its use, in aid of committing the offense;

(2) The property or service involved is owned by this or any other state or the United States, a municipality, or any political subdivision, department, or agency of any of them, or by a political party, or is part of a political campaign fund.

(B) Whoever violates this section is guilty of theft in office, a felony of the third degree.